

HIGH COURT OF JAMMU & KASHMIR AND LADAKH

AT SRINAGAR

Reserved on: 07.11.2022

Pronounced on : . 02 .12.2022

LPAOW No. 127/2017

Ali Mohammad and Others

..... Petitioner

Through: Mr. T.H. Khawaja, Advocate

Vs

State of J&K and others

..... Respondents

Through: Mr. S.A. Makroo, Sr. Advocate with,
Mr. Mohammad Amin, Advocate

Coram: HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE

HON'BLE MR. JUSTICE RAHUL BHARTI, JUDGE

JUDGMENT

Per Rahul Bharti-J:

1) This case has a knot which was tied by none else than this Court and is to be untied by none else than this very Court so as to truly serve the spirit of the dictum that an act of Court shall prejudice none. In the case of Jang Singh v/s Brij Lal and others, (1966 AIR SC 1631), the Hon'ble Supreme Court of India has, without any iota of reservation, eulogized that there is no higher principle for the guidance of the Court than the one that no act of Courts should harm a litigant and it is the bounden duty of the courts to see that if a person is harmed by a mistake of the court he should be restored to the position he would have occupied best for

that mistake. The maxim for this principle is identified by the Hon'ble Supreme Court of India is "*Actus curiae neminem gravabit*".

2) The successors-in interest of the original adversaries to the litigation are finding themselves locked in a situation which somehow got setup by an oversight on the part of this Court at the relevant point of proceedings in the case its docket, the potential of which is adversely bearing on the substantive rights of the parties to the lis with respect to the property in reference.

3) The facts attending the case trace back their origin to 1984 when with respect to land measuring 4.18 kanals situated in village Haigam/Sopore a mutation dated 22.02.1984 under Section 4 of the Agrarian Reforms Act, 1976, came to be attested in favour of Late Haji Malla Mohammed-the predecessor in interest of appellants herein followed by attestation of a mutation dated 02.03.1984 under section 8 of vesting of ownership qua said land in favour of said Haji Malla Mohammed under the Agrarian Reforms Act, 1976.

4) Against the said two mutations a statutory appeal under the Agrarian Reforms Act, 1976, came to be filed by Ali Najar-the predecessor in interest of the respondents 5 to 8 figuring in the present Letters Patent Appeal. Said statutory appeal had come to be disposed of by the

appellate authority vide its decision dated 12.10.1989 setting aside the said two mutations of substantive nature.

5) Aggrieved of the outcome of the said appeal being adverse to him resulting in upsetting of said two mutations which had earned ownership of above mentioned land in his favour, said Haji Malla Mohammed came to resort to the remedy of revision under the Agrarian Reforms Act, 1976, by challenging the appellate order dated 12.10.1989 before the Jammu and Kashmir Special Tribunal, Srinagar, which found favour with the case of said Haji Malla Mohammed and set aside the appellate judgment dated 12.10.1989 as a result whereof above referred two mutations came to be restored in terms of their effect and purpose. The Jammu and Kashmir Special Tribunal, Srinagar, in its judgment dated 12.10.1992 had found lack of locus on the part of said Ali Najar in challenging the said two mutations so passed in favour of Haji Malla Mohammed.

6) Against said judgment dated 12.10.1989 of the Jammu and Kashmir Special Tribunal, Srinagar, Ali Najar came to file writ petition bearing OWP no. 2982/1992 before this Court wherein in terms of an interim order dated 04.02.1993 the impugned judgment dated 12.10.1992 passed by the Jammu and Kashmir Special Tribunal, Srinagar, was ordered to be kept in abeyance.

7) Said Haji Malla Mohammed-as being the respondent

no. 5 in the writ petition OWP no. 2982/1992, came to appear and submit his reply/objections on 23.02.2000. Said writ petition OWP no. 2982/1992 of Ali Najar came to be dismissed by the Single Bench of this Court for non-prosecution vide its order dated 30.10.2002. This dismissal of the writ petition OWP no. 2982/1992 is the root situation of the issue borne in the present case.

8) Immediately after the dismissal of the writ petition OWP no. 2982/1992 for non-prosecution on the part of the petitioner Ali Najar, Haji Mohammed Malla came to expire in November 2002. Ali Najar-the original writ petitioner in OWP 2982/1992-too came to demise in the year November 2007 and during his lifetime he did not seek restoration of his said writ petition OWP no. 2982/1992.

9) It was in the year June, 2010, that seven persons, as being children of original writ petitioner Ali Najar-which includes the respondents 5 to 8 herein as being his sons, had come forward with three applications by reference to their father's dismissed-in default-writ petition OWP no. 2982/1992. All the three said applications borrowed the title of the writ petition and the mention of the parties therein as it is.

10) First application was IA no. 957/2010 for seeking permission by the above named children of writ petitioner-Ali Najar to file and maintain restoration application and

condonation of delay application by reference to dismissed-in-default writ petition OWP no. 2982/1992. In this IA no. 957/2010, the Single Bench addressed notice to Haji Malla Mohammed when in fact he had demised way back in the year 2002 after the dismissal in default of Ali Najar's writ petition OWP no. 2982/1992 on 30.10.2002.

11) By a purported reference to deemed service of the deceased Haji Malla Mohammed pursuant to the registered postal notice issued to him on 21.06.2011, the Single Bench proceeded to allow IA no. 957/2010 thereby granting permission in favour of the above named children of the writ petitioner-Ali Najar to file condonation of delay application along with restoration application for seeking restoration of OWP no. 2982/1992. On the basis of this order dated 26.07.2011, condonation of delay application no. 9589/2010 came to be diarized when on 9th August, 2011, the learned Single Bench directed issuance of notice to Haji Malla Mohammed as respondent no. 5 in the writ petition and again on the basis of reference to purported deemed service of said Haji Malla Mohammed, the steps for service of Haji Malla Mohammed and one of the other co-respondents is directed to be affected by publication in terms of an order dated 16th May, 2012 in daily newspaper Aftab.

12) On the basis of the said order notice for publication in the newspaper by purported failure of appearance on the

behalf of Haji Malla Mohammed-who was already a dead person, Single Bench came to set exparte proceedings in the matter in terms of an order dated 24.07.2012.

13) The condonation of delay application 958/2010 in which Haji Malla Mohammed was being reflected as a party respondent no. 5 came to be allowed thereby condoning the delay of 7 years and 186 days for filing restoration application vide an order dated 07.05.2013. The publication of the notice in the newspaper carried the very title of the writ petition OWP no. 2982/1992 reflecting dead person Ali Najar as petitioner and dead person Haji Malla Mohammed as respondent no. 5.

14) Consequent upon condonation of delay, the restoration application no. 77/2010 came to be allowed by the Single Bench vide an order dated 22.05.2013. Incidentally for this restoration application, the learned Single Bench, for reasons not on record, did not direct issuance of fresh notice in the matter to any of the non-applicants who being Haji Malla Mohammed as respondent no. 5 but on the basis of the exercise carried out in relation to service of Haji Malla Mohammed, through publication mode, in the IA no. 957/2010 the Single Bench proceeded exparte in the restoration application no. 77/2010 and allowed it vide its order dated 22.05.2013 by directing the main writ petition OWP no. 2982/1992 to be restored to its original number.

15) In the original writ petition no. 2982/1992, so restored no, exercise whatsoever for bringing on record the legal representatives of the original writ petitioner–Ali Najar came to take place nor for bringing on record the legal representatives of the deceased respondent no 5- Haji Malla Mohammed came to take place. In fact upon restoration of OWP no. 2982/1992 to its original number on the next date of hearing posted, which was 05.06.2013, the learned Single Bench had directed issuance of fresh notice to the respondent no. 5–Haji Malla Mohammed and again on the basis of deemed service of the respondent no. 5–Haji Malla Mohammed, he was proceeded as exparte without any order being on record of the file to said effect. It is a fact to be put on record here that in the year 2014 Srinagar City came to suffer unprecedented flooding resulting in submerging of residential houses and offices in the flood waters including the building premises of the High Court. It was only upon normalization of the calamity that resumption of hearing of the cases in the High Court had taken place after a gap of more than 3-4 months.

16) Writ petition OWP no. 2982/1992, without legal representatives either of the writ petitioner or of the deceased respondent no. 5 being brought on record came to be disposed of by the learned Single Bench vide its judgment dated 3rd February, 2015 in terms whereof impugned judgment dated 22.10.1992 of the Jammu and

Kashmir Special Tribunal, Srinagar, in favor of Haji Malla Mohammed came to be set aside by remanding back the matter to the Jammu and Kashmir Tribunal, Srinagar, for deciding the matter afresh after hearing both the parties.

17) Compounding the prejudice was the fact that the Jammu and Kashmir Special Tribunal, Srinagar, upon getting seized of the remand proceedings wide its order dated 26.05.2016 came to consign the revision petition of dead person Haji Malla Mohammed to records acting upon the understanding that the petitioner i.e., Haji Malla Mohammed had not come forward to pursue the revision so filed by him.

18) It is in the aforesaid backdrop of facts and circumstances of the case that the three sons of Haji Malla Mohammed came forward with a writ petition OWP no. 969/2017 filed before the Single Bench of this Court thereby challenging the order of the Jammu and Kashmir Special Tribunal, Srinagar, dated 26.05.2016 whereby the revision petition of Haji Malla Mohammed on file no. STS/2549/89 had been consigned to records, and along with this order, in the said writ petition OWP no. 969/2017 the sons of Haji Malla Mohammed-as being the writ petitioners-asked for recall of orders dated 07.05.2013, 22.05.2013 and 04.02.2015 passed by the learned Single Bench in the proceedings as referred herein above.

19) This writ petition no. OWP 969/2017 came to be dismissed by the learned Single Bench vide its judgment dated 15.07.2017 against which the present Letters Patent Appeal has come to be filed by the appellants as being the aggrieved writ petitioners.

20) The learned Single Bench focused its application of mind more on the maintainability of the writ petition so filed by the appellants rather than attending to the root of the cause of grievance of the appellants set up in the writ petition. The learned Single Bench, by reference to the judgment dated 04.02.2015 passed in disposing of OWP 2982/1992, has held that setting aside of judgment dated 22.10.1992 of the J&K Special Tribunal and remanding of the matter back to the J&K Special Tribunal, Srinagar for deciding the matter afresh after hearing both the parties caused no miscarriage of justice and as such held the writ petition filed by the appellants not maintainable and dismissed.

21) A bare perusal of the impugned judgment dated 15.07.2017 of the learned Single Bench would confirm one fact that the learned Single Bench, at the first instance omitted to scan the proceedings on the file of OWP no. 2982/1992 and the applications filed by the respondents 5 to 8 for seeking condonation of delay and restoration of the dismissed in default writ petition OWP no. 2982/1992. As we have detailed the entire course of proceedings

hereinabove which un-escapably confirms the fact that adjudication of OWP no. 2982/1992, after its purported restoration, had taken place in the face of situation that the writ petitioner Ali Najar was a dead person and the contesting respondent no. 5 Haji Mohammed Malla was also a dead person during the course of time when the writ petition OWP no. 2982/1992 had remained in default state, and as such the proceedings in the matter to put it in straight expression was by the dead against the dead.

22) By failing to see the said glaring procedural irregularity of substantial nature going to the very root of the adjudication attending writ petition OWP no. 2982/1992, the passing of judgment dated 03.02.2015 at the first instance and then passing of the impugned judgment in OWP 969/2017 were both nothing but amounting to nullity in the eyes of law. The principle of nullity is that nullity anywhere is nullity everywhere. On both given occasions firstly at the time of passing of judgment dated 3rd February, 2015, and then at the time of the impugned judgment dated 15.07.2017, the respective learned Single Bench had failed to serve and apply the principle of law that the act of court shall prejudice/injure no one.

23) When we apprise ourselves as to the end situation which came to take place as a consequence of judgment dated 3rd February, 2015 passed by the learned Single

Bench in disposing of OWP no. 2982/1992 by setting aside the judgment dated 22.10.1992 of the J&K Special Tribunal and reviving the revision petition but which further led to dismissal of the revision petition of the deceased Haji Malla Mohammed by the J&K Special Tribunal, we find that grave injustice had occasioned with respect to the legal cause of the deceased Haji Malla Mohammed and the adverse consequence of which came to befall upon his legal heirs/representatives who being the appellants herein and as such they were well within their right to complain to none else than this Court by whose omission and error unwarranted course of events and eventuality came to be set into effect and as such the learned Single Bench ought not to have failed in seeing the omission and error on the part of the court and loosing no time in remedying the same.

24) Court only enhances its prestige when it acknowledges and amends any wrong/mistake/error, be it advertent/inadvertent on its part in the course of a legal proceedings causing prejudice to a litigant in the lis before it. No delay is too long/late for the Court to do course correction for its own wrong/mistake/error so as to undo the effects and restore the justice.

25) The maxim Actus Curiae Neminem Gravabit i.e. an act of Court shall prejudice no one, is founded upon justice and good sense. Carnis, L.C, Said in Roger Vs. Comptoir d!

Escompte de Paris:(ERP. 125) has said

“One of the first and highest duties of all courts is to take care that the act of the courts does no injury to any of the suitors and when the expression, the act of the court is or, it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as whole from the lowest court which entertains jurisdiction over the matter up to the highest court which finally disposed of the case.”

26) Borne form the spirit of above said passage, this Court being the highest Court of the U.T of Jammu and Kashmir and U.T of Ladakh is equally bound to do as it expects the courts below to do which is to ensure that any error/omission on their part prejudicing the cause of a litigant shall be reversed at any given point of notice unmindful of the duration for which the error/omission has lasted. The principle is that a wrong order should not be given a run in relay.

27) Taking things from the angle that the proceedings in the case had taken place against the dead person and delivered the effect also against the dead person has effect of nullifying the entire course of proceedings notwithstanding the passing of the judgment dated 3rd February, 2015, by the learned Single Judge. Thus, when the

appellants had come to apprise by filing writ petition OWP no. 969/2017, this Court through learned Single Bench about the actual state of things in the case, the learned Single Bench ought not to have missed the occasion to examine the record and carry out the course correction so as to undo the injustice to the cause and case of late Haji Malla Mohammed.

28) In the light of aforesaid facts and circumstances of the case, we have held that in this case there has been a miscarriage of justice on account of error/omission though unintended but nevertheless a material one on the part of the learned Single Bench in the course of adjudicating OWP no. 2982/1992 and passing of judgment dated 23rd February, 2015. The miscarriage of justice occasioned second time also when the learned Single Bench in the writ petition OWP 969/2017 filed by the appellants herein failed to perceive the correct position of facts on record and thereby let the opportunity to make amend to the error committed on record go begging by declining the appellant herein the relief as sought by them in the said writ petition. In fact, the learned Single Bench in the writ petition filed by the appellants approached the case from a point of view which was not warranted and as such the judgment so passed renders itself not sound and good both in law and facts.

29) Thus not only we set aside judgment dated 3rd

February, 2015 of the learned Single Bench in OWP no. 2982/1992, but also the judgment dated 15.07.2017 in OWP no. 969/2017 and relegate the position back to the stage when the application for restoration of the writ petition OWP 2982/1992 was filed by the respondents 5 to 8 in which the deceased Haji Malla Mohammed was represented as non-applicant no. 5. The respondents 5 to 8 are directed to name the appellants as legal representatives of Haji Malla Mohammed, the deceased respondent no. 5, in the said restoration and condonation of delay application and thereafter the learned Single Bench shall hear the restoration application along with condonation of delay application on merits after affording right to object in favour of the appellants to said two applications. As a consequence of this judgment, the judgment dated 12.10.1992 passed by J&K Special Tribunal shall stand reviewed and set aside.

30) The letters patent appeal is accordingly allowed.

(RAHUL BHARTI)
JUDGE

(RAJNESH OSWAL)
JUDGE

Srinagar
02.12.2022
“Mir Arif”

Whether the order is speaking : Yes / No

Whether the order is reportable: Yes / No